Supreme Court, U.S.
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08-398

No.

IN THE
Supreme Court of the United States

Fred W. Allnut, Sr.,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

ISSUE I - The filing of handcarried tax returns is governed by a regulation which was strictly interpreted in favor of the government by the 4th Circuit Court of Appeals.

The issue raised is, "The application of the interpretation of the law by the 4th Circuit that requires delivery to the District Director or an administrative supervisor which leads to absurd results is unduly restrictive where a taxpayer attempts to hand deliver completed and signed tax returns to the District Director but delivers the returns to another person to whom he is directed and who states that he is authorized to accept documents on behalf of the District Director.

ISSUE II - The 4th Circuit Court of Appeals did not address the legal issue raised on appeal by the Appellant, but for different reasons upheld the Tax Court's decision.

The issue raised is, "By applying a *de novo* standard in reviewing a factual issue, by assuming facts that were not in the record and by ignoring and/or misconstruing facts found by the Tax Court, the April 23, 2008 decision of the 4th Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioner: "Fred W. Allnutt, Sr." and Respondent: "United States of America").

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Supreme Court Rule 29.6, Fred W. Allnutt, Sr. states:

1. He is not a subsidiary or affiliate of a publicly owned corporation; and

2. There is no publicly owned corporation that is not a party to this petition that has an interest in the outcome.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES ii

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Procedural History 2
B. Statement of Facts 2

REASONS FOR GRANTING THE WRIT 6

ISSUE I 7

The application of the interpretation of the law by the 4th Circuit that requires delivery to the District Director or an administrative supervisor which leads to absurd results is unduly restrictive where a taxpayer attempts to

hand deliver completed and signed tax returns to the District Director but delivers the returns to another person to whom he is directed and who states that he is authorized to accept documents on behalf of the District Director.

A. Court Applied Law Unduly Restrictively 7
B. Decision in Conflict with Supreme Court 13
C. Decision in Conflict with Other Circuits 13

ISSUE II 15

By applying a *de novo* standard in reviewing a factual issue, by assuming facts that were not in the record and by ignoring and/or misconstruing facts found by the Tax Court, the April 23, 2008 decision of the 4th Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

A. Incorrect Standard of Review Applied 15
B. Clearly Erroneous Standard Not Applicable 18

CONCLUSION 32

APPENDIX

Opinion of the Fourth Circuit of the United States Court of Appeals, dated April 23, 2008 ..... 1a

Final Order of the United States Tax Court, dated January 26, 2006 ..... 19a

United States Tax Court Memo,
dated December 26, 2002.....22a

Fourth Circuit's Denial of Motion for
Reconsideration En Banc
dated July 1, 2008.....42a

TABLE OF AUTHORITIES

Cases

Allnutt v CIR,
T.C. Memo 2002-311 ..... passim

Allnutt v. CIR,
523 F.3d 406 (4th Cir. 2008) ..... passim

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 17, 21, 29

Badaracco v. C.I.R.,
464 U.S. 386 (1984) 13, 14

Federal Nat. Mortg. Ass'n v. United Sates,
379 F.3d 1303 (Fed. Cir. 2004) 14

Hovey v. Ayers,
458 F.3d 892 (9th Cir. 2006) 29

Hull v. United States,
146 F.3d 235 (4th Cir. 1998) 13, 14

Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,
456 U.S. 844 (1982) 21

Lewin v. CIR,
335 F.3d 34 (4th Cir. 2003) 20, 21

Lydle v. United States,
635 F.2d 76 (CA6 1981) 22

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,
463 U.S. 29 (1983) 28

Orvis v. Higgins,
180 F.2d 537 (CA2 1950 22

Owens v. CIR,
568 F.2d 123 (6th Cir. 1977) 19

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 22

Rakes v United States,
442 F.3d 7 (1st Cir. 2006) 14

Stone Container Co. v. United States,
229 F.3d 1345 (Fed. Cir. 2000) 14

Swanson v. Baker Industries, Inc.,
615 F.2d 479 (CA8 1980) 22

United States v. Dalm,
494 U.S. 596 (1990) 13, 14

United States v. United States Gypsum Co.,
333 U.S. 364 (1948) 18, 24

United States v. Yellow Cab Co.,
338 U.S. 338 (1949) 21

Vintilla v. United States,
931 F.2d 1444 11th Cir. 1991) 14

Wainwright v. Sykes,
433 U.S. 72 (1977) 23

Wainwright v. Witt,
469 U.S. 412 (1985) 23

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100 (1969) 18

Statutes

§6091(b)(4) 9

26 U.S.C. §6091(b)(4) 1, 8, 12

26 U.S.C. §6501(a) 1

26 U.S.C. §7482(a) 19

28 U.S.C. §1254(1) 1

Rules

Rule 52(a), Federal Rules of Civil Procedure... passim

Rule 58, Federal Rules of Civil Procedure 20

Supreme Court Rule 10 6

Tax Court Rule 90(d) 27

Tax Court Rule 90(f) 27

Tax Court Rule 91 27

Regulations

26 C.F.R. 1.6091-2(d)(1) 9, 12

26 C.F.R. §1.6091-2 ..... 5, 10

PETITION FOR WRIT OF CERTIORARI

Petitioner Fred W. Allnutt, Sr. respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the 4th Circuit which affirmed the Tax Court's decision.

OPINIONS BELOW

The Tax Court's Final Order per Judge John O. Colvin (Appendix page 19a) was not published. The Tax Court Memo per Judge John O. Colvin is published at *Allnutt v. CIR*, T.C. Memo 2002-311 (Appendix page 22a). The 4th Circuit Court of Appeal's opinion (Appendix page 1a), per Circuit Judges Duncan Hamilton and Osteen, affirming the Tax Court decision is published at *Allnutt v. CIR*, 523 F.3d 406 (4th Cir. 2008). The denial of the Motion for Rehearing *En Banc* is not published (Appendix page 42a). A stay of mandate was not sought.

STATEMENT OF JURISDICTION

The 4th Circuit entered its opinion and order on April 23, 2008 and the Motion for Rehearing and Rehearing *EN BANC* was denied on July 1, 2008. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The primary statutes are the relevant portions of 26 U.S.C. §6501(a) and 26 U.S.C. §6091(b)(4) which are set forth in the body of the Petition.

STATEMENT OF THE CASE

A. Procedural History.

On March 6, 2000, the Commissioner of the Internal Revenue Service (CIR) issued and mailed to Fred W. Allnutt, Sr. (Allnutt) a 90-day Statutory Notice of Deficiency for the tax years 1987-1990 and 1992-1997. Allnutt timely filed a Petition to the Tax Court on May 31, 2000 in which he claimed the three year statute of limitations under 26 U.S.C. §6501(a) barred the issuance of the Notice of Deficiency for the years 1986-1990 and 1992-1995. After an initial hearing on the matter the Tax Court issued its opinion on December 26, 2002. See *Allnutt v. Commissioner*, T.C. Memo 2002-311.

After a rather lengthy process due to other issues the Tax Court rendered a final decision on January 26, 2006. A timely Notice of Appeal was filed on April 11, 2006.

After oral arguments, the 4th Circuit rendered it opinion on April 23, 2008, see *Allnutt v. CIR*, 523 F.3d 406 (4th Cir. 2008). The opinion upheld the Tax Court's decision, but for different reasons. Allnutt petitioned for a Rehearing *EN BANC*, but it was denied on July 1, 2008. Allnutt now petitions the United States Supreme Court for a Writ of Certiorari to review the decision of the 4th Circuit.

B. Statement of Facts

In February, 1997 Alluntt was before the Tax Court in another Tax Court case. Allnutt was directed by

Gregory S. Hrebiniak, an assistant United States Attorney with the Department of Justice to file his completed 1040 income tax returns for the years 1981 to 1995 with the District Counsel's office. Hrebiniak was representing the CIR before the Tax Court in Allnutt's case. The instructions was given to his attorney, Jeffrey Dickstein, who relayed said instructions to Allnutt. On February 20, 1997, pursuant to the instructions given by Hrebiniak, Allnutt prepared completed signed 1040 income tax returns for the years 1981 to 1995. Allnutt additionally made copies of the signed original returns which he then signed over the copied signatures with blue ink.

On February 21, 1997, Allnutt hand delivered the original returns to the office of the Baltimore Office of District Counsel in accordance with Hrebiniak's instructions. With the original signed returns Allnutt included a letter of transmittal which stated as follows:

> "Dear Mr. Harrington and Mrs. Henn,
> I am delivering to District Counsel with this letter original filings of 1040 tax returns for the year 1981 and for each year thereafter up through and including 1995. My attorney, Mr. Jeffrey Dickstein, has spoken with Mr. Gregory S. Hrebiniak, Department of Justice, who instructed him to have me file said returns with District Counsel."

At an unknown date the returns that were hand delivered to the District Counsel's office were

forwarded to the Baltimore Special Procedures Office. The Special Procedures Office stamped the returns received from the District Counsel's office as received on March 10, 1997, but these returns were never processed by the CIR.

Later, but on the same day that he delivered the tax returns to the District Counsel, Allnutt also hand delivered the second set of returns, i.e. the copied returns with the blue signatures over the copied signatures, along with a copy of the transmittal letter to the offices of Paul M. Harrington (hereinafter, Harrington), Baltimore District Director, at 31 Hopkins Plaza, Baltimore, Maryland. This address is the permanent post of duty in the internal revenue district for the Baltimore District where taxpayers may file their returns by hand carrying.

When Allnutt arrived at 31 Hopkins Plaza he asked a security guard for directions to Harrington's office. The guard directed Allnutt to a second person. Allnutt then asked the person he was directed to for directions to Harrington's office, but was told that Harrington was at lunch. After some discussion, the same person told Allnutt that he could leave the package with him and he would give it to Harrington when he returned from lunch. Allnutt specifically asked this person if he had authority to accept documents on Harrington's behalf and he stated that he did. Allnutt then wrote "Attn: Paul Harrington" on the envelope containing a copy of the letter of transmittal and the returns with the overwritten blue ink signatures. Allnutt then gave the closed envelope to the very same person that he had been

directed to by the security guard and left the building. No identifying marks or stamps were placed on the returns by the District Director's office.

The returns delivered to the District Director's office eventually arrived at the Philadelphia Service Center on May 14, 1997 and were the only returns processed by the CIR as indicated by the Services centers stamps and Document Locator #s. Testimony at the Tax Court hearing was given by CIR witness Ms. Arczyski who stated that the returns were most likely sent by the Taxpayer Services.

A Notice of Deficiency was mailed on March 6, 2000 by the CIR to Allnutt. The Tax Court specifically found that Allnutt did in fact deliver the tax returns to the District Director's Office on February 21, 2008. But the Tax Court ruled that because Allnutt did not *intend* these returns to be filed returns, the delivery was not a filing and did not start the 3 year statute of limitations. Instead the Tax Court ruled the *filing* occurred on March 10, 1997 (the date the non-processed returns were delivered to Special Procedures). Thus, based on March 10, 1997 being the filing date of Allnutt's returns, the Tax Court found that the Notice of Deficiency was mailed within the statutory time limits.

In its April 23, 2008 decision (Allnutt v. CIR, 538 F.3d 406, *supra*) the 4th Circuit Court of Appeals affirmed the Tax Court's decision regarding the statute of limitations, but for different reasons. The 4th Circuit adopted an unduly restrictive interpretation of 26 C.F.R. §1.6091-2 and ruled that

the three year statute of limitations did not begin to run because Allnutt did not deliver the tax returns to the District Director. Accordingly, the panel reasoned that the period of limitations did not start on February 21, 1997, but on March 10, 1997 when the Special Services office received the returns that were not processed.

Allnutt timely petitioned the 4th Circuit for a Rehearing *EN BANC* and the petition was denied on July 1, 2008.

REASONS FOR GRANTING THE WRIT

Allnutt is mindful of the criteria set forth in Supreme Court Rule 10 which are used to determine whether the Court should review a decision of an appellate court. The criteria which are applicable in this case are:

> 1.) A United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court;
>
> 2.) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> 3.) a United States court of appeals has entered a decision in conflict with the

decision of another United States court of appeals on the same important matter.

ISSUE I

The application of the interpretation of the law by the 4th Circuit that requires delivery to the District Director or an administrative supervisor which leads to absurd results is unduly restrictive where a taxpayer attempts to hand deliver completed and signed tax returns to the District Director but delivers the returns to another person to whom he is directed and who states that he is authorized to accept documents on behalf of the District Director.

A. Court Applied Law Unduly Restrictively.

A Writ of Certiorari is warranted when the 4th Circuit interprets unduly restrictively a statute in such a way that its application leads to absurd results and requires a taxpayer to document the status of a federal employee to whom the taxpayer is directed and who states to the taxpayer that he is authorized to receive documents on behalf of a District Director. The panel's application of an unduly restrictive interpretation of law on an important federal question is in conflict with both the Supreme Court and other circuit decisions.

The question of when Allnutt filed his tax returns is of vital importance in this case. On the one hand, if Allnutt *filed* his returns on February 21, 1997, the Notice of Deficiency dated March 6, 2000 is invalid

and Allnutt cannot be assessed. On the other hand, if the *filing* of Allnutt's returns is deemed to be March 10, 1997, when non-processed returns were received at Special Procedures, then the Notice of Deficiency is valid. But the filing date of March 10, 1997 has no legal support.

When Allnutt appealed to the 4th Circuit he raised only one legal issue: Did the Tax Court err in its holding that *intent* was a required element of filing a tax return when Allnutt delivered the signed tax returns to the District Director's office?

This issue was predicated on the Tax Court's ruling that the tax returns were delivered to the District Director's office. But the Tax Court ruled that because Allnutt did not *intend* them to be filed, his delivery was not a *filing*. Because Allnutt failed to meet this new and arbitrary imposition of a requirement of intent to file it resulted in the Tax Court ruling that Allnutt did not "meticulously comply" with the statutes. Thus, according to the Tax Court, the three year period of limitations did not start.

The panel determined that the statute and regulations specifying the place for filing hand-carried return must be strictly construed in favor of the government. The specific statute that addresses the place for the filing of hand-carried returns is 26 U.S.C. §6091(b)(4). §6091)b)(4) states:

> (4) Hand-carried returns
> Notwithstanding paragraph (1), (2), or (3), a return to which paragraph (1)(A), (2)(A), or

> (3)(A) would apply, but for this paragraph, which is made to the Secretary by handcarrying shall, under regulations prescribed by the Secretary, be made in the internal revenue district referred to in paragraph (1)(A)(i), (2)(A)(i), or (3)(A)(i), as the case may be.

§6091(b)(4) merely states that the returns are to be filed with the Secretary in the internal revenue district of the taxpayer's residence pursuant to regulations prescribed by the Secretary.

The regulation addressing hand-carried returns in force in 1997 that was prescribed by the Secretary was 26 C.F.R. 1.6091-2(d)(1), which states in pertinent part,

> "returns of persons other than corporations which are filed by hand shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) ... ."

The regulation was construed by the panel so strictly that Allnutt was required to "demonstrate that these returns were actually delivered to the District Director on February 21, 1997, or on any date prior to March 6, 1997." See April 23, 2008 Opinion in the Appendix at page 16a. (Note that all references to the 4th Circuit April 23rd opinion and the Tax Court

Memo are set forth in the "Opinions Below" will be to the page in the Appendix the reference is made) According to the panel at page 14a,

> "... in order for returns to be considered 'filed' for purposes of setting the period of limitation in motion, the returns must be delivered, in the appropriate form, to the *specific* individual or individuals identified in the Code or Regulation." (Emphasis in original)

Pursuant to §1.6091-2 this *specific* person was the District Director or a supervisor of the office, not some other person. Because Allnutt could not document that he delivered his tax returns to the District Director or to a supervisor, the panel found that he did not *file* his tax returns when he delivered them to the District Director's office.

The strict interpretation applied by the panel which required Allnutt to prove he delivered his tax returns to the District Director specifically or to an administrative office supervisor leads to absurd consequences.

At the hearing on October 24, 2001 that addressed this issue, Allnutt, in his direct examination of the Ms. Arczynski, the assistant director's secretary, asked what process was utilized when a return was delivered to the District Director's office in 1997. Her response was,

> "If a return came into the director's offices, an original return was brought

> to the director's office, I would advise that taxpayer to take that return to the walk-in area of customer service for assistance."[1]

Pursuant to the overly strict interpretation of the regulation, even if a taxpayer did go to the taxpayer's services as required by Ms. Acrzynski, he would have to obtain documentation from the clerk at the window to determine if the clerk was a supervisor of the office. This would be necessary because if the CIR later claimed he did not file with a supervisor, as the opinion mandates, the taxpayer would have no proof that he delivered the tax returns to the specific individual. This is absurd.

Another absurd result comes from the overly restrictive interpretation is that no return could have been officially filed by Allnutt. Yet, the very returns deemed not filed were officially processed by the IRS. In fact, the only returns processed by the CIR were the ones delivered by Allnutt to the District Director on February 21, 1997. These were stipulated as the "filed" returns in the Stipulation of Facts and Documents:

> "The returns petitioner filed at District Director Harrington's offices on February 21, 1997 were the returns that were processed at respondent's Service Center located in Philadelphia, Pennsylvania, on May 14, 1997, were the returns containing the

---

[1] Ms. Arczynski later testified that the term "customer service" is the current term. The correct term in 1997 was "taxpayer services."

> Philadelphia, Pennsylvania Service Center stamp "May 14, 1997, Received IRS District."

These same "non-filed" returns were the ones that were the basis for the March 6, 2006 Notice of Deficiency. If no returns were filed, then the deficiency notices were not based on any returns. This is equally absurd. The returns were filed.

It is also equally absurd for a court to require a taxpayer who goes to the District Director's Office to file a handcarried tax return and is directed to another person who claims the authority to accept handcarried returns, that he document that the person he gave the returns to is actually the person authorized to receive handcarried returns.

What makes the decision of the 4th Circuit especially disturbing is that the CIR through the testimony of the assistant director's secretary admitted that the Taxpayer Services office was probably the office that forwarded the returns filed with the District Director's office to the Service Center for processing.

Finally, the unduly restrictive interpretation of §6091(b(4) and its corresponding regulation is also in direct conflict with the active policy of the District Director's office which renders it impossible for any taxpayer to comply with a strict construction of 26 C.F.R. §1.6091-2.

According to the practices of the District Director's office in 1997, as stated above, because Ms. Arczynski would not allow any taxpayer to

deliver a tax return to the District Director, no taxpayer would have been able to *file* a tax return by hand-carrying the return to the District Director. Thus, the policy of the District Director's office is in direct conflict with a strict interpretation and renders it impossible to strictly comply with the regulation.

B. Decision in Conflict with Supreme Court.

The 4th Court recognized that "The dispute centers on the date Allnutt should have been deemed to have 'filed' the returns in question." In footnote #5 of the decision the panel chose not to address the issue raised by Allnutt, i.e. the question of whether *intent* is an element in filing. Instead, the panel chose to give the above strict construction to the statute of limitations provisions. The principle authority relied upon for said construction was *Badaracco v. C.I.R.*, 464 U.S. 386, 391-392 (1984). But in doing so the panel was in direct conflict with the principle set forth in *United States v. Dalm*, 494 U.S. 596, 608 (1990) which upheld the principle that courts are not to make unduly restrictive construction of statutes.

C. Decision in Conflict with Other Circuits.

Not only is the decision of the 4th Circuit to apply an overly restrictive interpretation to a statute in conflict with the Supreme Court, it is also in conflict with its own decisions and other circuits decisions. The same principle found in *Dalm*, *supra*, is also the policy of the 4th Circuit as expressed in *Hull v. United States*, 146 F.3d 235, 238 (4th Cir. 1998).

In *Hull* the court quoted *Badaracco* as stating, "When courts interpret a statute of limitations for suits against the government, the statute 'must receive a strict construction in favor of the Government,'" *Badaracco, supra*, 464 U.S. at 398. Yet, immediately after recognizing the requirement of strict construction, the court also cited *Dalm* as stating, "[A]lthough we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended," *Dalm*, supra, 494 U.S. at 608.

Thus, it is Supreme Court policy, which is also followed by the 4th Circuit, that while provisions for periods of limitation must be construed strictly, they must also not be construed unduly restrictively. This principle prevents a court from preferring form over substance by elevating its strict interpretation of the law over the underlying realities of what actually happened. In other words, the Supreme Court's prohibition against unduly restrictive interpretations of law prevents a court from magnifying the letter of the law to the point of missing the substance of the law really intended by the legislature.

Other circuits follow the same principle. See *Federal Nat. Mortg. Ass'n v. United Sates*, 379 F.3d 1303, 1310 (Fed. Cir. 2004); *Stone Container Co. v. United States*, 229 F.3d 1345, 1352 (Fed. Cir. 2000); *Rakes v United States*, 442 F.3d 7, FN6 (1st Cir. 2006); and *Vintilla v. United States*, 931 F.2d 1444, 1446 (11th Cir. 1991).

Because the 4th Circuit has applied an interpretation to a statute and its corresponding regulation on an important federal question in such a way that its application leads to absurd results and is contrary to the District Director Office's own policy, it is an unduly restrictive interpretation and is contrary to the principle forbidding unduly restrictive interpretations of law in both the Supreme Court and other circuit decisions. Accordingly, granting of the Writ of Certiorari by the Supreme Court is warranted.

ISSUE II

By applying a *de novo* standard in reviewing a factual issue, by assuming facts that were not in the record and by ignoring and/or misconstruing facts found by the Tax Court, the April 23, 2008 decision of the 4th Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

A. Incorrect Standard of Review Applied.

When the 4th Circuit panel applied a *de novo* standard of review to a review of a factual finding of the Tax Court, the panel has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power through the granting of a Writ of Certiorari. The clearly erroneous standard for reviewing findings of fact of a lower court is the

accepted standard of review to be used by appellate courts as established by the Supreme Court.

As stated above, when Allnutt appealed to the 4th Circuit he raised essentially one ***legal*** issue: Did the Tax Court err in its holding that *intent* was a required element of filing a tax return when Allnutt delivered the signed tax returns to the District Director's office? The basis upon which the Tax Court ruled against Allnutt was solely on the issue of whether he had the intent to deliver his tax returns to the District Director's office. The Tax Court specifically found:

> "Petitioner testified that, on February 21, 1997, he delivered an envelope containing his photocopied returns with original signatures for 1981-95 to an individual in the office of the District Director who told petitioner that he had the authority to accept deliveries for the District Director." T. C. Memo at page 31a.

Instead of addressing the legal issue of intent as decided by the Tax Court and raised by Allnutt on appeal, the panel stated, "We review de novo the legal question of whether Allnutt's so-called 'delivery' of the photocopied returns with original signatures constituted a 'filing sufficient to start the running of the period of limitation.'" See Opinion at page 11a. Yet, near the beginning of its Opinion, at page 3a, the 4th Circuit panel proclaimed that it was going to "focus on the facts pertinent to establishing whether Allnutt's 1981 through 1995 tax returns

were filed prior to March 6, 1997." The panel had no intention of addressing the legal issue of intent.

In fact, the 4th Circuit panel explained its decision not to address the legal issue of intent in footnote #5 of the Opinion on page 16a by stating, "We decline to opine, however, as to whether these cases can be read as adding an intent element to the listed filing requirements in the Code and Regulations, as we find instead that Allnutt failed to meticulously comply with the *named* requirements thereof." The panel then conducted a *de novo* review of the factual findings of the Tax Court. A *de novo* review of a lower court's factual findings is not within the accepted and usual course of judicial proceedings in appellate courts and is in direct violation of "clearly erroneous" standard in Rule 52(a) of the Federal Rules of Civil Procedure.

The prohibition of reviewing a lower court's factual findings through a *de novo* standard is thoroughly addressed by the Supreme Court in *Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985). In reversing a 4th Circuit decision that incorrectly applied the clearly erroneous standard, the Supreme Court stated,

> "Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized,

> is that '[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969)."

Thus, the Supreme Court has made it clear that appellate courts depart from the accepted and normal course of judicial proceedings when they opt to review the factual findings of a lower court under a *de novo* standard. Accordingly, the 4th Circuit panel departed from the accepted and normal course of judicial proceedings when it opted to review the factual findings of the Tax Court under a *de novo* standard.

B. Clearly Erroneous Standard Not Applicable.

When the 4th Circuit panel reversed the factual findings of the Tax Court by assuming facts that were not in the record, and by ignoring and/or misconstruing facts found by the Tax Court, 4th Circuit Court panel so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power through the granting of a Writ of Certiorari. The application of the clearly erroneous standard for reviewing findings of fact of a lower court is the accepted standard by the Supreme Court and, if applied by the 4th Circuit panel, would have prevented a reversal of said facts.

Even if the 4th Circuit panel had reviewed the Tax Court's finding of facts under the clearly erroneous standard, it still could not have reversed the Tax Court's factual findings. Instead, what the panel did was render a *post hoc* rationalization which included assuming facts that were not in the record and ignoring and/or misconstruing facts found by the Tax Court.

The standard of review by an appellate court of a Tax Court decision is dictated by 26 U.S.C. §7482(a) which states in pertinent part, "The United States Courts of Appeal ... shall have exclusive jurisdiction to review the decisions of the Tax Court, ..., in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury, ..." See *Owens v. CIR*, 568 F.2d 1233, 1238 (6th Cir. 1977). The "clearly erroneous" standard is the standard of review for an appellate court reviewing the factual findings of the Tax Court, see

Lewin v. CIR, 335 F.3d 345, 350 (4th Cir. 2003). The "clearly erroneous" standard is the same standard as found in Rule 52(a) which governs the review of civil actions from district courts.

Rule 52(a) in pertinent part states,

> **Rule 52. Findings by the Court; Judgment on Partial Findings**
>
> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. ***Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*** (Emphasis added)

It is clear from Rule 52(a) that a reviewing court may not reverse the factual findings of a lower court "unless clearly erroneous." This is confirmed by the 4th Circuit in *Lewin, supra,* 335 F.3d at 350, wherein the court stated, "If resolving this issue is a question

of fact, then the court cannot disturb the Tax Court's decision unless it is clearly erroneous."

The Supreme Court has also extensively addressed the proper meaning and application of the "clearly erroneous" standard. In *Anderson, supra,* 470 U.S. at 573-575 the Supreme Court gave this lengthy explanation:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982).
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. To be sure, various Court of Appeals have on occasion asserted the theory that an appellate court may exercise de novo review over findings not based on credibility determinations. See, e. g., Orvis v.

Higgins, 180 F.2d 537 (CA2 1950); Lydle v. United States, 635 F.2d 763, 765, n. 1 (CA6 1981); Swanson v. Baker Industries, Inc., 615 F.2d 479, 483 (CA8 1980). This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand, see Orvis v. Higgins, supra, but it is impossible to trace the theory's lineage back to the text of Rule 52(a), which states straightforwardly that "findings of fact shall not be set aside unless clearly erroneous." That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." Pullman-Standard v. Swint, 456 U.S., at 287.

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only

negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a "tryout on the road.'" Wainwright v. Sykes, 433 U.S. 72, 90 (1977). For these reasons, review of factual findings under the clearly-erroneous standard -- with its deference to the trier of fact -- is the rule, not the exception.

When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 469 U.S. 412 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors

> other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See, e. g., United States v. United States Gypsum Co., supra, at 396. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."

The 4th Circuit panel plainly violated the "clearly erroneous" standard as explained by the Supreme Court. Instead of reviewing the evidence and giving deference to the findings of the Tax Court, the panel chose to render its own *post hoc* rationalization in determining that Allnutt did not file his tax returns on February 21, 1997. The panel's *post hoc* rationalization included assuming facts that were not in evidence, and ignoring and/or misconstruing facts found by the Tax Court.

The panel spins a story that gives a false impression that Allnutt gave his tax returns to a random and unidentified person somewhere in the building. The view of the panel painted by the panel appears to be that Allnutt was allowed to randomly roam a government building until he happened upon an unknown individual also roaming the hallways. The record does not reflect the panel's version. Allnutt was directed to a specific person known by the security guard, not a random person. In its account the panel placed very strong emphasis on the alleged fact that Allnutt gave an envelope containing his tax returns to an unidentified gentleman in a hallway on another floor than Harrington's office. The strong emphasis on the "unidentified gentleman," plus the following list of the uses that the panel made of the emphasized terms "floor" or "hallway" is used by the panel to support its inaccurate view.

1. "The second person, an unidentified gentleman whom Allnutt encountered on a ***different floor*** than Harrington's office, also told Allnutt that Harrington was at lunch and offered to take the package from him and give it to Harrington upon his return." See Opinion at page 5a.

2. "District Director Harrington's secretary, Susan Arczynski ("Arczynski"), testified before the Tax Court that she typically processed all deliveries addressed to Harrington and that if the ***gentleman in the hallway*** brought the package in question to Harrington's office it

"would have been presented to [her]." See Opinion at page 6a.

3. "Allnutt left a sealed envelope containing his returns with an unidentified man of unknown title that he encountered in the ***hallway somewhere in the building***." Opinion at page 16a.

4. "Although, by happenstance, Allnutt's photocopied returns made their way from ***the stranger in the hallway*** to the IRS Philadelphia Service Center on May 9, 1997 and were ultimately processed, ..." Opinion at 16a.

The term "floor" is only mentioned once in the Tax Court's Memo, See T.C. Memo at page 26a where in the Tax Court found, "Personnel in the District Director's office usually directed persons who asked where to file tax returns to the walk-in area of the taxpayer services office on the first floor." This is also where Ms. Arczynski would have directed a taxpayer.

The term "hallway" was never mentioned in the Tax Court Memo, nor was it mentioned in any of the appellate filings. Thus, it is clear that the Panel conjured up a story by assuming facts that were not in the record to match its *post hoc* rationalization for ruling that Allnutt did not file his returns.

It should further be noted that the panel also used such descriptive terms as "unidentified," "gentleman," and "stranger" to label a person which

the security guard knew and to whom Allnutt was directed by the security guard. Allnutt could not remember who the person was, but the facts found by the Tax Court were clear, the person was a person known to the security guard who directed Allnutt to him. And, if the security guard did as was the policy of the District Director's office, as found by the Tax Court, he would have directed Allnutt to the taxpayer services. There is nothing in the record that indicates that the security guard directed Allnutt to some random unknown person somewhere in the building. Allnutt was directed to a specific person whom Allnutt did not know.

To further support its *post hoc* rationalization the panel also ignored and misconstrued facts found by the Tax Court. Tax Court Rule 91 requires the parties to stipulate to the facts as binding. Rule 91 states that the stipulations shall be conclusive as to the admissions of the parties and cannot be withdrawn except by permission of the Court. Rule 90(f) states that matters admitted are conclusively established and cannot be withdrawn except by permission of the Court. Rule 90(d) states that the signature of the attorney indicates that he certified that he has read the document.

It was noted in Allnutt's Appellant Brief at page 25 that the returns in question were stipulated as "filed" by the parties. The Tax Court found that the tax returns were delivered "to an individual in the office of the District Director who told petitioner that he had the authority to accept deliveries for the District Director." See T.C. Memo at page 30a. The only issue the Tax Court found that it opined would

prevent Allnutt's returns as being filed was his intent. The issue of intent was the only issue raised on appeal.

The panel's *post hoc* rationalization to ignore the government's stipulation and the Tax Court's finding that the returns were delivered to a person who claimed he had authority to accept documents for the District Director flies in the face of the well settled rule of law that a court cannot uphold the actions of an agency unless there is some articulation upon which the decision of the court can be based. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Since the CIR admitted that the returns were delivered and the Tax Court found likewise, one is left to wonder why the panel conjured up it *post hoc* rationalization and why the Supreme Court should give it any credence.

To further illustrate the fallaciousness of the panel's decision the Court should consider that the Tax Court found that Allnutt "consistently and repeatedly described the steps he took to deliver the photocopied returns with original signatures." See T.C. Memo at page 31a. The only thing he did not do, according to the Tax Court, was have the new and arbitrary element of the proper intent. Yet, the 4th Circuit panel describes the detailed steps that Allnutt took to deliver the returns as a "lack of diligence." Even so, according to the panel, the only thing Allnutt did not do was to document who the person was that he gave the returns to. What is telling is that the decision cites no statute nor references any law that requires a taxpayer to

document the status of a government employee who states that he has authorization to receive documents on behalf of the District Director.

In addition, "Factual findings made by the district court are reviewed under the 'significantly deferential' clearly erroneous standard, in which we accept the district court's findings of fact absent a 'definite and firm conviction that a mistake has been committed.'" See *Hovey v. Ayers*, 458 F.3d 892, 900 (9th Cir. 2006). Thus, the "clearly erroneous" standard of review does not permit a reviewing court to reverse the facts found by a lower court unless there is a definite mistake. According to *Anderson, supra*, 470 U.S. at 573, this is true, "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." And it "can virtually never be clear error," when as here, "a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding." See *Anderson, supra*, 470 U.S. at 574-575.

Since the returns were present in fact in the offices of the District Director, as evidenced on the returns by the Service Center received date stamp of May 14, 1997, and since Ms. Arczynski never received or processed them, the only available place for them to have been delivered to the Service Center is Taxpayer Services. This is the place where the security guard, if he followed office policy, should have directed Allnutt when he directed him to the second person. In doing his job consistently with the

policy of the District Director's office, the security officer would have directed a taxpayer coming into the building to the walk-in area (Taxpayer Services). The Taxpayer Services is the only available place where Allnutt or any other taxpayer would have been sent. It is highly incredulous that a security guard would direct a taxpayer to an unidentified man in the hallway as the panel states. It is also an assumption of fact not in the record that the security guard did not send Allnutt to the proper person. Further, because the person admitted that he was authorized to receive documents for the District Director, he was obviously an administrative supervisor.

The Tax Court found that the evidence clearly indicated that the returns were received and stamped by the Service Center as being received from the District Director's office. This is another fact ignored by the panel.

The bottom line is that the facts ignored and misconstrued by the panel clearly show that Allnutt's returns were processed. And it is highly plausible that before they were processed, they were received and handled by the walk-in area of the District Director's office. Yet, the only documentation as to who received and handled the returns in the District Director's office is in the possession and control of the CIR. It should be noted that the envelope in which the returns were delivered was never produced in discovery by the CIR. The record clearly shows that the District Director's office had the returns, yet it somehow has no documentation of having said returns. The panel

now requires Allnutt to prove something the law does not require, i.e., the production documentation when any such documentation is in the possession and control of the CIR. This places an impossible burden on Allnutt.

There is in fact documentation that substantiates Allnutt's position that he filed his tax returns before March 6, 1997, which both the Tax Court and the 4th Circuit panel ignored. The CIR kept concurrent records on a Form 895 to ensure that the statute of limitations for sending a Notice of Deficiency was not missed. The Form 895 introduced in the Tax Court record showed that two IRS employees understood the beginning of the statute of limitation was in February of 1997. An unidentified IRS employee changed the date on the Form 895 three years and four days after the date Allnutt delivered his tax returns. The Tax Court dismissed offhand this evidence with the following statement;

> "A Form 895 does not establish when a taxpayer's returns were filed; filing of a return is established by facts showing proper delivery or mailing of a return with the intent to file it as a return." T.C. Memo at page 40a.

The 4th Circuit panel acknowledged the existence of the Form 895. See Opinion at page 8a. In its description of the Form 895 it even noted that an unidentified IRS employee changed the date on February 25, 2000, i.e. three years and four days after Allnutt delivered his tax returns. See Opinion at page 9a. The Form 895 documentation kept by the

CIR renders Allnutt's position that he filed his tax returns with the proper person more plausible than not. The obvious doctoring of the only evidence in the possession of the CIR that collaborated Allnutt's position was noted, but ignored by the panel.

In a nutshell, Allnutt arrived at the District Director's office building and was directed to a second person, not an unknown person in the hallway, but a person known by the security guard. That person could have only been in the Taxpayer Services walk-in area. When this person to whom the guard had directed Allnutt offered to take the package to the District Director, Allnutt asked him if he had such authority. He responded that he did. Allnutt could do nothing more. This was all acknowledged by the Tax Court and ignored by the panel.

CONCLUSION

Allnutt has shown that the decision made by the panel gives an overly restrictive construction of the regulation on an important federal question governing the place to deliver hand-carried tax returns to the point of being absurd and renders it impossible for any taxpayer to file a handcarried return. The use of an unduly restrictive interpretation is in direct conflict with the Supreme Court policy and that of other courts of appeal. Accordingly, The Supreme Court should grant the Writ of Certiorari.

Furthermore, the decision applied a *de novo* review standard to a factual finding of the Tax

Court, which is inconsistent with the accepted and normal course of judicial proceedings at the appellate level. In addition, had the panel's understanding of the facts been congruent with the actual facts, the only conclusion it could have reached was that Allnutt did in fact file his returns on February 21, 1997. The resulting *post hoc* rationalization to determine that Allnutt did not meticulously comply with filing his tax returns with the proper person involved assuming facts not in the record and ignoring and misconstruing facts found by the Tax Court. The result was so far a departure from the accepted and usual course of judicial proceedings that it gives the appearance that the 4th Circuit has sanctioned the cover up of the CIR in acknowledging that it knew the tax returns were in fact filed on February 21, 1997. The overly restrictive construction and apparent blindness to the true facts in favor of the IRS gives the impression of an unfair bias. Such a biased opinion impinges the integrity of the court and requires this Court to exercise it supervisory power by granting the Writ of Certiorari.

Respectfully Submitted on this 25th Day of September, 2008.

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FRED W. ALLNUTT, SR.,
Petitioner-Appellant,

v. No. 06-1477

COMMISSIONER OF
INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the United States Tax Court.
(Tax Ct. No. 00-6133)

Argued: March 19, 2008
Decided: April 23, 2008

Before DUNCAN, Circuit Judge, HAMILTON, Senior Circuit Judge, and William L. OSTEEN, Jr., United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Senior Judge Hamilton and Judge Osteen joined.

COUNSEL ARGUED: Charles E. McFarland, New Castle, Kentucky, for Appellant. Marion Elizabeth Erickson, Tax Division, UNITED STATES

DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Eileen J. O'Connor, Assistant Attorney General, Andrea R. Tebbets, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

DUNCAN, Circuit Judge:

Appellant Fred W. Allnutt, Sr. ("Allnutt") failed to timely file his federal income tax returns for the years 1981 through 1995. In 1997, after being acquitted of certain tax crimes, Allnutt prepared the past returns and submitted them to the Internal Revenue Service ("IRS"). In 2000, the IRS issued a notice of deficiency for those tax years, indicating that he underpaid by nearly two million dollars.

Allnutt subsequently filed a petition before the United States Tax Court arguing that the notice of deficiency was barred by the three-year limitations period established in § 6501(a) of the Internal Revenue Code (the "Code"), 26 U.S.C. § 6501(a), and that the IRS was therefore prohibited from assessing and collecting his delinquent taxes and accrued penalties. The Tax Court found that the IRS properly issued the notice to Allnutt within the three-year period immediately following the date that he filed his income tax returns. Because Allnutt has failed to demonstrate that he "meticulously complied" with the applicable statutory provisions for filing income tax returns on a date more than three years prior to the IRS's issuance of the notice of deficiency, we affirm the Tax Court's judgment.

I.

The parties agree that the IRS issued Allnutt a notice of deficiency on March 6, 2000. The parties also agree that § 6501 of the Code requires the IRS to assess a taxpayer's deficient taxes or to issue him a notice of deficiency within three years from the date the taxpayer "files" his federal income tax return. The dispute here centers on the date Allnutt should be deemed to have "filed" the returns in question. Thus, we focus on the facts pertinent to establishing whether Allnutt's 1981 through 1995 tax returns were filed prior to March 6, 1997.

A.

After a federal investigation into Allnutt's alleged Internal Revenue Code violations concluded in 1997, Allnutt hired an accounting firm to belatedly prepare his tax returns (Forms 1040) for the years 1981 through 1995. He was instructed by his counsel, who was in contact with the Department of Justice, to "file [his returns by hand] with the District Coun[se]l's office in Baltimore."[1] J.A. 208.

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[1] As Allnutt later realized, this advice was ill-given. The District Counsel's office is part of the IRS's legal department which, with the help of the United States Justice Department, represents the IRS in certain court proceedings. It does not have the authority to accept tax returns for filing. In 1997, a Baltimore, Maryland resident, such as Allnutt, wishing to file his federal income tax returns by hand was required to deliver the returns to the District *Director's* Office in Baltimore, not the District *Counsel's* Office. *See* 26 C.F.R. § 1.6091-2 (1997). The District Director's Office, now defunct, was responsible for the administration of all IRS operations within a given tax district.

On February 20, 1997, Allnutt signed his prepared tax returns for the years 1981 through 1995 (the "original returns") and wrote the following letter of transmittal to accompany those returns, addressed to the IRS District Director for the Baltimore area, Paul Harrington ("Harrington"), and the IRS District Counsel for the Baltimore area, Elizabeth Henn ("Henn"):

> Dear Mr. Harrington and Mrs. Henn,
> I am delivering to District Counsel with this letter original filings of 1040 tax returns for the year 1981 and for each year thereafter up through and including 1995. My attorney, Mr. Jeffrey Dickstein, has spoken with Mr. Gregory S. Hrebiniak, Department of Justice, who instructed him to have me file said returns with District Counsel.

J.A. 199. Allnutt then photocopied the returns and signed over the photocopied signatures with blue ink (the "photocopied returns").

On February 21, 1997, Allnutt delivered the original returns, along with the letter of transmittal, to Henn's secretary at the IRS District Counsel's office in Baltimore. Allnutt admits that he intended for these original returns to be his filed returns and that he thought he had effectively filed them by delivering them to the District Counsel's office.[2]

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[2] Allnutt acknowledged before the Tax Court, and again on appeal, that delivery of the original returns to the District Counsel's office did not constitute "filing" of those returns under the applicable provisions of the Internal Revenue Code

Henn's secretary stamped the transmittal letter "received 2/21/97" and signed her name under the stamp. J.A. 199. These original returns were ultimately forwarded from the District Counsel's Office to the Special Procedures Office of the Baltimore District Director (the "Special Procedures Office").[3] The original returns arrived at the Special Procedures Office without any identifying marks or date/time stamps. The Special Procedures Office stamped them "received" on March 10, 1997. An unknown individual from that office later wrote, "Copy of Return Secured [or received] by Examination. 5/1/97," on the top of the first page of each of the returns. *See Allnutt v. C.I.R.*, T.C.M. (RIA) 2002-311, 2002 WL 31875119, at *2 (2002). These returns were never further processed by the IRS. *See* J.A. 24.

After Allnutt left the District Counsel's office, he took the transmittal letter and the photocopied returns in a clasped envelope marked "Attention Mr. Paul Harrington" to the IRS office building housing the Baltimore District Director's offices. He did so to "provid[e] [District Director Harrington] copies of the returns . . . as a courtesy more than as a filing." J.A. 218. Upon his arrival to the building, Allnutt asked a security guard for directions to Harrington's office. The guard told him that Harrington was at lunch and directed him to a second person. The second person, an unidentified gentleman whom Allnutt

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and the United States Treasury Regulations ("Treasury Regulations" or "Regulations").

[3] The Special Procedures Office of the District Director is responsible for various aspects of tax collection within a district, but does not ordinarily accept tax returns for filing.

encountered on a different floor than Harrington's office, also told Allnutt that Harrington was at lunch and offered to take the package from him and give it to Harrington upon his return. Allnutt asked the gentleman, whose title or position Allnutt failed to request or obtain, if he had "authority to accept packages on behalf of Mr. Harrington." J.A. 221. The gentleman responded affirmatively. Allnutt then asked if he would "be sure to give it to Mr. Harrington personally." J.A. 221. The gentleman agreed, and Allnutt gave him the package. At no time did Allnutt disclose to the gentleman the contents of the package, ask that the gentleman see to the filing of the enclosed returns, ask that the package or the enclosed returns receive a date stamp, or request a filing receipt. Allnutt testified that he "didn't consider getting a second date stamp [at the District Director's offices] because the first date stamp [at the District Counsel's office] to [him] confirmed the filing date." J.A. 218. Allnutt also failed to consult the IRS employees working at the "Taxpayer Services" walk-in area located on the first floor of the building, as is customary for taxpayers attempting to file hand-delivered returns.

District Director Harrington's secretary, Susan Arczynski ("Arczynski"), testified before the Tax Court that she typically processed all deliveries addressed to Harrington and that if the gentleman in the hallway brought the package in question to Harrington's office it "would have been presented to [her]." J.A. 221. Her usual practice was to stamp an item with the time and date that she received it, and to use Harrington's routing stamp on the item if there was room to do so. If there was no room on the

document, she would ordinarily staple to the item a small routing slip containing the same information as the routing stamp. According to Arczynski, she always used a routing stamp if the item was an income tax return. She also testified that personnel in the District Director's offices usually directed persons who wanted to file a tax return to the walk-in area of the Taxpayer Services office located on the entry level, or first floor.

Arczynski was present at the District Director's offices on February 21, 1997- the day that Allnutt visited the building- but could not remember whether she had received the package containing his photocopied returns. These photocopied returns received no routing stamp or routing slip marked February 21, 1997. Sometime between that date and May 9, 1997, however, the photocopied returns were forwarded to the IRS Philadelphia Service Center. On the front page of each return appears: (1) "IRS Received from District 052197"; (2) "Postmark 050997" and "Received 051497"; (3) "Delinquent Original Cleared for Processing by 285" on June 16, 1997; and (4) "Resort Received" on June 27, 1997. *See Allnutt v. C.I.R.*, T.C.M. (RIA) 2002-311, 2002 WL 31875119, at *3 (2002). On the bottom left corner of the front page of each return, "POS sorted for statute review, 5-14-97," also appears, but is struck out in an attempt to make it indistinguishable. *Id.* On a date not specified in the record, an unidentified IRS employee also added a document locator number to the upper right corner of the first page of each photocopied return. The government admits that these returns, rather than the originals delivered to the District Counsel's

office, were those processed by the IRS. *See* J.A. 24.

B.

Section 6501 of the Code requires the IRS to assess any deficiency in a taxpayer's payment of taxes or to issue a notice of deficiency to the taxpayer within three years from the date the taxpayer files the applicable return. *See* 26 U.S.C. § 6501. IRS personnel use an internal document, Form 895, to keep track of the limitations period for each filed return. Any IRS employee who handles a return "has the responsibility to ensure that the statute of limitations date for that return is correctly reflected in the case file" and on the form. Internal Revenue Service, Internal Revenue Manual 4.7.3.4, http://www.irs.gov/irm/ (last visited April 16, 2008). Personnel are instructed to determine that date by first ascertaining the return's "Received Date" and then adding to it the appropriate limitations period. *Id.* 25.6.2.4.13-15. The "Received Date," in turn, is deduced from the date postmarked on the envelope in which the returns were sent or on the return itself. If there are no such postmarks, IRS employees are instructed to record the taxpayer's self-reported date of signature, found on the return, as the "Received Date." *Id.* 25.6.2.4.13.

The IRS employee initially responsible for Allnutt's file was Franklin D. Blum ("Blum"). Blum recorded the "Received Date" for Allnutt's return as February 20, 1997. Blum ascertained this date based upon Allnutt's date of signature because there were no postmarked dates available on either the face of the returns or the envelope containing the returns. Blum thus recorded the statute of limitations

expiration date on the Form 895 as February 20, 2000-three years from Allnutt's date of signature. The February 20th expiration date was subsequently certified as correct by another IRS employee. On February 25, 2000, however, this expiration date was updated and changed, by an unidentified IRS employee, to March 10, 2000-three years from the date the original returns were received by the Special Procedures Office of the Baltimore District Director from the District Counsel's office.

The IRS mailed a notice of deficiency to Allnutt for the years 1987-1990 and 1992-1995 on March 6, 2000.[4] The notice listed Allnutt's tax deficiencies as: $1,197,033 for tax year 1987; $274,126 for 1988; $10,253 for 1989; $112,208 for 1990; $82,632 for 1992; $1,774 for 1993; $17,581 for 1994; and $19,992 for 1995, plus additions to tax under § 6651(a)(1) of the Code for failure to file timely returns and under § 6653(a) for negligence, and accuracy-related penalties under § 6662. The notice of deficiency was issued more than three years after Allnutt delivered both the original returns to the District Counsel's office and the photocopied returns with original signatures to the unidentified individual in the building housing the Baltimore District Director's offices - February 21, 1997. The notice was issued

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[4] This notice also included Allnutt's deficiency amounts for tax years 1996 and 1997. We do not include those amounts here because Allnutt only contends that the notice of deficiency was untimely for years 1987-1990 and 1992-1995.

less than three years, however, from the date the original returns were marked as received by the Special Procedures Office of the Baltimore District Director - March 10, 1997, and the date the Philadelphia Service Center marked the photocopied returns as postmarked - May 9, 1997.

Allnutt subsequently filed a petition in the United States Tax Court for review and redetermination of the deficiencies asserted in the notice, pursuant to § 6213(a) and § 6503(a) of the Code. He later filed a motion for summary judgment, claiming that the three-year limitations period barred the IRS's issuance of the notice of deficiency and the subsequent assessment of his tax deficiencies. The Tax Court denied Allnutt's motion and held a hearing on the issue. The Tax Court ultimately found the following: (1) Allnutt was a credible witness and did deliver the photocopied returns with original signatures to "someone in the building containing the District Director's offices on February 21, 1997"; (2) Allnutt did not, however, "file" those photocopied returns on that date because he did not "honestly and reasonably" intend those returns to be "his filed returns," and "[a] taxpayer may not, by his or her ambiguous conduct, even if unintentional, secure the benefit of the limitations period"; and (3) Allnutt's "returns were filed on March 10, 1997, when the Special Procedures Office of the Baltimore District Director stamped them received." *See Allnutt v. C.I.R.*, T.C.M. (RIA) 2002-311, 2002 WL 31875119, at *4-5 (2002). Therefore, the court held that the notice of deficiency, sent by the IRS on March 6, 2000, was properly issued within the three-year limitations period beginning

on March 10, 1997 - the date that Allnutt's returns were deemed filed. After the Tax Court issued its final decision on other issues in Allnutt's case not applicable here, Allnutt filed a timely appeal.

II.

Allnutt maintains that the three-year limitations period established in 26 U.S.C. § 6501(a) barred the IRS from assessing the deficiencies in his income taxes. He claims that he "filed" his returns on February 21, 1997, thereby triggering the start of the limitations period, when he gave the clasped package containing his photocopied returns to the unidentified gentleman in the District Director's office. Thus, according to Allnutt, the three-year statute of limitations expired on February 21, 2000 - approximately two weeks prior to the IRS's issuance of the notice of deficiency on March 6, 2000. " *See Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453, 462, 50 S.Ct. 215, 74 L.Ed. 542 (1930); *see also Badaracco v. C.I.R.*, 464 U.S. 386, 391-92, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984).

Section 6501(a) of the Code provides that the IRS must assess any deficiency in the payment of income taxes "within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed)." 26 U.S.C. § 6501(a). As a general rule, no such assessment can be made until a notice of deficiency has been mailed to the taxpayer. *See id.* § 6213(a). "[T]he IRS's mailing of a notice of deficiency simultaneously serves two functions. First, it tolls the three-year statute of limitations, and second, it commences a process that enables the taxpayer to challenge the deficiency." *St. Joseph*

Lease Capital Corp. v. C.I.R., 235 F.3d 886, 888 (4th Cir.2000). Once a notice is mailed, the three-year period is extended 90 days from the mailing date to permit the taxpayer an opportunity to petition the Tax Court for a redetermination of the deficiency. *See id.* §§ 6213(a), 6503(a). If the taxpayer files such a petition, the three-year period is extended yet further until 60 days following the date when the decision of the court on the taxpayer's petition becomes final. *See id.* § 6503(a); *St. Joseph Lease Capital Corp.*, 235 F.3d at 888. If the IRS fails to meet any of the above deadlines, the limitation period expires and the IRS is barred from assessing, and therefore collecting, any deficiency owed by the taxpayer. *Id.*

It is well established that "a statute of limitation runs against the United States only when [it] assent[s] and upon the conditions prescribed." *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 249, 50 S.Ct. 297, 74 L.Ed. 829 (1930). "Statutes of limitation sought to be applied to bar rights of the Government, [therefore] must receive a strict construction in favor of the Government." *Badaracco*, 464 U.S. at 391-92, 104 S.Ct. 756. (quoting *E.I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456, 462, 44 S.Ct. 364, 68 L.Ed. 788 (1924)). Thus, a taxpayer seeking to "secure the benefit of the limitation" must demonstrate "*meticulous compliance* . . . with all named conditions" and applicable requirements of the Code and the Treasury Regulations. *Lucas*, 281 U.S. at 249, 50 S.Ct. 297 (emphasis added).

Section 6091(b)(1)(A) of the Code requires that an individual taxpayer file his federal income tax

return "(i) in the internal revenue district in which is located [his] legal residence or principal place of business . . . or (ii) at a service center serving th[at] internal revenue district . . ., as the Secretary [of the Treasury] may by regulations designate." The Treasury Regulations in effect in 1997, when Allnutt's returns were allegedly filed, provided the following:

> (a) . . . [I]ncome tax returns of individuals, estates and trusts shall be filed with the district director for the internal revenue district in which is located the legal residence or principal place of business of the person required to make the return, or, if such person has no legal residence or principal place of business in any internal revenue district, with the District Director at Baltimore, Md. 21202.
> (d) Hand-carried returns. . . .
> (1) Persons other than corporations. Returns of persons other than corporations which are filed by hand carrying shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) as provided in paragraph (a) of this section.

26 C.F.R. § 1.6091-2 (1997). The parties agree that since Allnutt's returns were "hand-carried" and he

was a Maryland resident at the time, he was required to file his returns with the Baltimore "district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director)." *See id.*

The Code does not define the term "file" or "filed." Courts have long held, however, that in order for returns to be considered "filed" for purposes of setting the period of limitations in motion, the returns must be delivered, in the appropriate form, to the *specific* individual or individuals identified in the Code or Regulations. *See Helvering v. Campbell,* 139 F.2d 865, 868 (4th Cir.1944) (finding the filing of returns with the Philippine Collector under the Philippine income tax law insufficient to set the period of limitations running for purposes of the taxpayers' United States domestic taxes when the "statute required that [the] returns . . . be filed with the Collector at Baltimore"); *W.H. Hill Co. v. Commissioner of Internal Revenue,* 64 F.2d 506, 507 (6th Cir.1933) (finding the delivery of a tax return to an internal revenue agent for forwarding to the IRS Commissioner not to constitute "filing" of the return with the Collector, as the statute required). Compliance with this requirement is vital so as to "apprise the proper tax official . . . of the liability of taxpayers for the federal income tax imposed upon them." *Helvering,* 139 F.2d at 868.

Thus, to prevail here, Allnutt first must demonstrate that he "*meticulously complied*" with the Code's and Regulation's requirement that he or

his agent deliver his "hand-carried returns" *to the Baltimore district director or administrative supervisor,* not to some other individual regardless of his or her proximity to the prescribed person. *See Lucas,* 281 U.S. at 249, 50 S.Ct. 297; *Helvering,* 139 F.2d at 868; 26 C.F.R. § 1.6091-2 (1997). To avail himself of the protections of the statute of limitations, Allnutt must further show that he filed the returns in such a manner on or before March 6, 1997. *See* 26 U.S.C. § 6501 (requiring that taxes be assessed or a notice of deficiency issued within three years of the filing date).

The record before us and the findings of the Tax Court make clear that Allnutt cannot so demonstrate. Allnutt admits that his delivery of the original returns to the District Counsel's office did not constitute a filing. And, his delivery of the photocopied returns to the District Director's offices was anything but "meticulous." Allnutt never delivered the photocopied returns to District Director Harrington, his assistant, or even his office. Nor did he take the photocopied returns to the "Taxpayer Services" walk-in area in the District Director's office building as is standard practice for taxpayers attempting to file hand-carried returns. Rather, operating under the mistaken assumption that his returns had been filed earlier with the District Counsel's office, Allnutt left a sealed envelope containing his returns with an unidentified man of unknown title that he encountered in the hallway somewhere in the building. Instead of requesting a filing receipt, getting the returns date and time stamped, or recording that gentleman's name for his records, Allnutt merely hoped that the

gentleman would keep his word and deliver the package to District Director Harrington.

Indeed, Allnutt admits that he forewent the careful, calculated procedures that he followed earlier with respect to the original returns at the District Counsel's Office because he never intended for the photocopied returns, dropped off only "as a courtesy," to be filed.[5] J.A. 218. Although, by happenstance, Allnutt's photocopied returns made their way from the stranger in the hallway to the IRS Philadelphia Service Center on May 9, 1997 and were ultimately processed, Allnutt is unable to demonstrate that these returns were actually delivered to the District Director on February 21, 1997 or on any date prior to March 6, 1997. In fact, we have no indication of the whereabouts of the

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[5] The Tax Court based its decision, in part, on Allnutt's admission that he "did not intend" for the photocopied returns with original signatures "to be his filed returns." *See Allnutt v. C.I.R.*, T.C.M. (RIA) 2002-311, 2002 WL 31875119, at *12-13 (2002). In support of this analysis, the court, and the government in its brief, cite to several cases, including *Florsheim Bros.*, 280 U.S. at 462, 50 S.Ct. 215. These cases do stand for the proposition that for a document to be considered a "return" for statute of limitations purposes, the taxpayer must "honestly and reasonably intend" for the document "to be a specific statement of the items of income, deductions, and credits *in compliance with [the Code]*," *Florsheim Bros.*, 280 U.S. at 462, 50 S.Ct. 215. (emphasis added). We decline to opine, however, as to whether these cases can be read as adding an intent element to the listed filing requirements in the Code and Regulations, as we find instead that Allnutt failed to meticulously comply with the *named* requirements thereof.

returns from the time Allnutt delivered them to the unidentified gentlemen until they were postmarked on May 9, 1997.

In an attempt to now overcome his past lack of diligence with respect to his actual filing, Allnutt points to the initial Form 895 in his IRS file, listing the received date of his return as February 20, 1997 and the statute of limitations expiration date as February 20, 2000. This form, however, fails to carry the weight Allnutt lades upon it. First, as Allnutt admits and as is evident from the dates inscribed on the form, Blum (the IRS agent initially responsible for Allnutt's file) ascertained the February 20th received and expiration dates based upon Allnutt's self-declared date of signature on his returns, not from any other evidence that Allnutt delivered the returns directly to the District Director at that time. In fact, as Allnutt also admits, Blum used this date specifically because there were no other dates indicating when the returns had been filed. Furthermore, although the statute-of-limitation date on IRS internal documentation may be used as evidence of the appropriate filing date, contrary to Allnutt's intimation, the IRS is not bound by their own internal documents or self-imposed due dates. *See, e.g., Smith v. C.I.R.*, T.C. Summ.Op. 2001-130, 2001 WL 1922722 (2001) (using Form 895 only as additional evidence of the tax return's received date when the actual postmarked return was also in evidence). Here, the IRS noticed the supposed error and changed the filing date to March 10, 1997 - the only verified date available indicating when Allnutt's returns, original or photocopied, were actually received by an office affiliated with the Baltimore

District Director. Allnutt provides no documentation demonstrating with any degree of certainty that his returns were filed prior to this date.

We are not wholly unsympathetic to Allnutt's plight, and cannot help but observe that the IRS could have obviated the problem here by proceeding more expeditiously. However, because statutes of limitation must be strictly construed in the government's favor and Allnutt is unable to prove that, on or before March 6, 1997, he meticulously complied with the Code and Regulation's requirements for filing his tax returns, we are unable to find that the government is barred from assessing and collecting Allnutt's considerable tax deficiencies. Therefore, we conclude that the IRS's issuance of the notice of deficiency on March 6, 2000, less than three years from March 10, 1997, was timely.

III.

For the foregoing reasons, the judgment of the Tax Court is

AFFIRMED.

UNITED STATES TAX COURT
WASHINGTON, DC 20217

FRED ALLNUTT,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 6133-00.
	)	
COMMISSIONER OF INTERNAL REVENUE	)	
	)	
Respondent	)	

ORDER

In Allnutt v. Commissioner, T.C. Memo. 1991-6, affd. without published opinion 956 F.2d 1162 (4th Cir. 1992), cert. denied 506 U.S. 816 (1992), we sustained respondent's determination regarding petitioner's liability for tax and additions to tax (including fraud) for 1981-86.

Respondent issued a notice of deficiency to petitioner for 1987-97. In response, petitioner asserted, inter alia, that his income for the years 1987-97 was offset by net operating losses (NOLs) that he incurred during 1981-86. In Allnutt v. Commissioner, T.C. Memo. 2002-311, we held that petitioner was precluded by the doctrine of res judicata from contending that his deductions exceeded his income for 1981-86. In Allnutt v. Commissioner, T.C. Memo. 2004-239, we stated that decision will be entered for petitioner's tax years 1987-97 under Rule 155 of the Tax Court Rules of Practice and Procedure. Respondent's computation

for entry of decision under Rule 155 was filed on February 25, 2005.

Petitioner's-objection to respondent's computation and alternate computation was filed on October 4, 2005. Petitioner's Motion to Reopen and Reconsider Order Dated December 26, 2002 for Inclusion of Previously Denied Deductions Because of a Mistake at Law was filed on October 4, 2005. During the Rule 155 stage, we consider only arguments that relate to the computation of the deficiency, liability, or overpayment resulting from the findings and conclusions made by the Court. Rule 155(c). However, our result would not be different even if we did consider the arguments petitioner raises in his motion or objection to respondent's computation for entry of decision.

Petitioner contends that the mitigation provisions in I.R.C. §§ 1311-1315 apply in this case, that there was a double disallowance of a deduction for purposes of I.R.C. § 1312(4), that his deductions for 1981-86 exceeded his income, and that he may carry forward NOLs to 1987-97, the years in issue here.

Petitioner is not entitled to relief under the mitigation provisions. The mitigation provisions can apply to eliminate inconsistent treatment of valid deductions; however, it has not been shown that petitioner was entitled to deductions he claimed for 1981-86 or that those deductions were treated inconsistently. A double deduction, as that term is used in I.R.C. § 1312(4), is not present here because petitioner has not shown that a deduction was disallowed for a year which should have been but

was not allowed for another year. See sec. 1.1312-4(a), Income Tax Regs.

In his objection to respondent's computation and alternate computation, petitioner contends that his delivery of returns to someone in the building containing the District Director's offices on February 21, 1997, constituted the filing of those returns. We decided this issue at Allnutt v. Commissioner, T.C. Memo. 2002-311. We do not view paragraph 7 of the stipulation filed on October 24, 2001, as respondent's concession of this clearly disputed issue. See Lewin v. Commissioner, T.C. Memo. 2003-305; Feinberg v. Commissioner, T.C. Memo. 2003-304; Cohen v. Commissioner, T.C. Memo. 2003-303. As to the authority of the undersigned to act in this case, see the Court's order dated September 9, 2005.

Based on the foregoing, it is

ORDERED that Petitioner's Motion to Reopen and Reconsider Order Dated December 26, 2002 for Inclusion of Previously Denied Deductions Because of a Mistake at Law is denied. It is further

ORDERED that the decision will be entered as submitted in respondent's computation for entry of decision.

/s/ John O. Colvin
John O. Colvin
Judge

Dated: Washington, D.C.
January: 26, 2006

T.C. Memo. 2002-311

UNITED STATES TAX COURT

FRED ALLNUTT, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 6133-00.

Filed December 26, 2002.

Fred Allnutt, pro se.
Bradley C. Plovan, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

COLVIN, Judge: Respondent determined deficiencies in petitioner's Federal income tax and additions to tax as follows:

		Additions to tax and penalties		
Year	Deficiency	Sec. 6653(a)	Sec. 6651	Sec. 6662
1987	$1,197,033	$63,143	$269,331.98	--
1988	274,146	16,379	61,682.50	--
1989	10,253	--	2,307.20	$2,050.60
1990	112,208	--	25,247.25	22,441.60
1992	82,632	--	18,592.68	26,526.40
1993	1,744	--	--	354.80
1994	17,581	--	--	3,516.20
1995	19,992	--	--	3,998.40
1996	16,702	--	--	3,340.40
1997	20,177	--	--	4,035.40

This case is before the Court to decide the following issues:

1. Whether respondent timely issued the notice of deficiency to petitioner for tax years 1987-90 and 1992-95. Resolution of that issue depends on whether petitioner filed his 1987-90 and 1992-95 Federal income tax returns when he hand delivered those returns to respondent's offices at 31 Hopkins Plaza, Baltimore, Maryland, on February 21, 1997. We hold that his delivery of the returns on that date did not constitute filing and that the notice of deficiency was timely issued.

2. Whether petitioner is barred by res judicata from carrying forward net operating losses from 1981-86 to the years in issue. We hold that he is.

3. Whether to grant petitioner's motion to dismiss this case and to impose sanctions on respondent under Rule 104(c). We will deny petitioner's motion.

Further trial is necessary to resolve the remaining issues in this case. Unless otherwise specified, section references are to the Internal Revenue Code in effect for the applicable years, and Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found.

A. Petitioner

Petitioner resided in Maryland when he filed the petition. An accounting firm prepared petitioner's tax returns for 1981-95.

B. Petitioner's Delivery of Tax Returns to Respondent's Offices

On February 20, 1997, petitioner signed income tax returns for 1981-95 (original returns with original signatures). After he signed those returns, he photocopied them and signed them in blue ink over his photocopied signatures (photocopied returns with original signatures).

Petitioner prepared a letter of transmittal addressed both to Paul M. Harrington (Harrington), Baltimore's District Director, and Elizabeth S. Henn (Henn), in the Baltimore office of District Counsel. Petitioner's letter stated:

> Dear Mr. Harrington and Mrs. Henn,
> I am delivering to District Counsel with this letter original filings of 1040 tax returns for the year 1981 and for each year thereafter up through and including 1995. My attorney, Mr. Jeffrey Dickstein, has spoken with Mr. Gregory S. Hrebiniak, Department of Justice, who instructed him to have me file said returns with District Counsel.

Petitioner delivered the original returns with original signatures for 1981-95, accompanied by the letter of transmittal, to Henn's secretary at the Baltimore, Maryland, Office of District Counsel, 200 St. Paul Place, Suite 2602, at about 11:25 a.m. on February 21, 1997. At that time, petitioner intended those to be his filed returns, and he believed that he had filed those returns by delivering them to the office of District Counsel. Henn's secretary date stamped and signed a copy of the transmittal letter.

Petitioner then went to respondent's offices at 31 Hopkins Plaza, Baltimore, which included the office of the Baltimore District Director. Petitioner entered the building at about 11:45 a.m. and asked a security guard for directions to Harrington's office. The guard told petitioner that Harrington was at lunch and directed petitioner to a second person. Petitioner asked that person for directions to Harrington's office. That second person told petitioner that Harrington was at lunch and that he (the second person) could hold the package and give it to Harrington when Harrington returned from lunch. Petitioner asked the second person if he had authority to accept documents on Harrington's behalf, and the second person said that he did. Petitioner wrote "Attn: Paul Harrington" on the envelope containing the letter of transmittal and the photocopied returns with original signatures for 1981-95. Petitioner closed the flap on the envelope that contained those returns and secured the metal clasp. Petitioner did not show or identify the contents of the envelope to the second person. Petitioner gave the envelope to the second person.

C. Respondent's Processing of the Returns

1. Respondent's Procedures

In 1997, deliveries for Harrington were usually processed by Susan Arczynski (Arczynski), the assistant district director's secretary. Her usual practice was to stamp the time and date when she received an item and to use the director's routing stamp on the item if there was room to do so. If there was no room for the director's routing stamp, Arczynski's usual practice was to staple to the item a small routing slip containing the same information as the routing stamp. She always used a routing slip instead of the stamp if the item was a tax return.

Arczynski was at work on February 21, 1997. At trial, she could not remember whether she had received Allnutt's package of returns for the years 1981-95.

Personnel in the District Director's office usually directed persons who asked where to file tax returns to the walk-in area of the taxpayer services office on the first floor.

2. Processing of the Returns Delivered to District Counsel

Respondent's District Counsel's office did not place any identifying marks or stamps on the returns for the years in issue that petitioner delivered to Henn's secretary on February 21, 1997 (i.e., the original returns with original signatures). Those returns were forwarded to the Baltimore

Special Procedures Office of the District Director, which stamped them received on March 10, 1997. Someone wrote on the top of the first page of each of those returns "Copy of Return Secured [or Received] by Examination. 5/1/97".

3. Processing of the Returns Delivered to 31 Hopkins Plaza

Respondent did not place a date received stamp on or make any other record showing when respondent received the photocopied returns with original signatures for the years in issue.

An unidentified person (or persons) in respondent's Philadelphia Service Center stamped the following on the front page of each photocopied return with original signature for the years in issue: (1) "IRS Received from District 052197"; (2) "Postmark 050997" and "Received 051497; and (3) "Delinquent Original Cleared for Processing by 285" on June 16, 1997, and "Resort Received" on June 27, 1997. Someone from an unidentified IRS office stamped on the bottom left corner of the front page of each photocopied return with original signature for the years in issue "POS sorted for statute review, 5-14-97". However, that stamped information was marked through in an attempt to make it unreadable. On a date not specified in the record, an unidentified person acting for respondent added a document locator number to the upper right corner of the first page of each photocopied return with original signature for the years in issue.

Respondent mailed the notice of deficiency to petitioner for tax years 1987-90 and 1992-97 on March 6, 2000.

D. Allnutt v. Commissioner

Petitioner previously filed a petition in this Court seeking our review of the Commissioner's determination of deficiencies in petitioner's income tax for 1981-86. Allnutt v. Commissioner, T.C. Memo. 1991-6 (Allnutt I), affd. without published opinion 956 F.2d 1162 (4th Cir. 1992), cert. denied 506 U.S. 816 (1992). In Allnutt I, we granted the Commissioner's motion to dismiss the case for failure to state a claim because petitioner made only frivolous allegations. We also sustained the Commissioner's determination relating to deficiencies in petitioner's income tax for 1981-86 and decided that petitioner had the following amounts of taxable income:

Year	Amount
1981	$433,059
1982	409,575
1983	- - 386,090
1984	342,223
1985	298,355
1986	1,913,176

Id. In Allnutt I, we also (1) sustained additions to tax under section 6654 as determined by the Commissioner; (2) granted the Commissioner's

motion for summary judgment as to fraud under section 6653(b)(1); and (3) granted the Commissioner's motion for imposition of a penalty under section 6673. Id. Our decision in Allnutt I is final.

OPINION

A. Whether Respondent Timely Issued the Notice of Deficiency to Petitioner for Tax Years 1987-90 and 1992-95

1. Contentions of the Parties

We first decide whether respondent timely issued the notice of deficiency for petitioner's tax years 1987-90 and 1992-95. Generally, the Commissioner must assess tax within 3 years after the due date of a timely filed return or the filing of the return. Sec. 6501(a). The notice of deficiency was sent on March 6, 2000. If petitioner filed returns for those years before March 6, 1997, the assessment of deficiencies for 1987-90 and 1992-95 is barred by the statute of limitations.[6] Id. If petitioner's returns were not filed before March 6, 1997, the notice of deficiency was timely issued.

Petitioner contends that (1) on February 21, 1997,

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[6] Respondent does not contend that petitioner omitted more than 25 percent of his gross income, see sec. 6501(e), that he consented to an extension of the time to assess tax, or that there are any other circumstances that would lengthen the usual 3-year period for assessment of tax.

he delivered the photocopied returns with original signatures for the years in issue to the Baltimore District Director's office, and (2) his delivery of that set of returns constitutes filing of those returns.[7] Respondent contends that petitioner's returns for the years in issue were filed on March 10, 1997, when the Baltimore District's Special Procedures Office stamped them received.

2. Whether Petitioner Delivered the Photocopied Returns With Original Signatures for the Years in Issue to 31 Hopkins Plaza on February 21, 1997

We next decide whether, as petitioner contends, he delivered to 31 Hopkins Plaza in Baltimore on February 21, 1997, the photocopied returns with original signatures for the years in issue.

The cover letter petitioner delivered on February 21, 1997, to the office of District Counsel shows that he intended to file his original returns with the office of District Counsel, and intended to deliver a copy of those returns to the District Director.

Petitioner testified that, on February 21, 1997, he delivered an envelope containing his photocopied returns with original signatures for 1981-95 to an individual in the office of the District Director who told petitioner that he had the authority to accept deliveries for the District Director.

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[7] Petitioner concedes that delivery of his original returns with original signatures to respondent's office of District Counsel does not constitute filing of those returns.

Respondent contends that petitioner's testimony is not credible. We disagree. We decide whether a witness is credible on the basis of objective facts, the reasonableness of the testimony, and the demeanor of the witness. Quock Ting v. United States, 140 U.S. 417, 420-421 (1891); Wood v. Commissioner, 338 F.2d 602, 605 (9th Cir. 1964), affg. 41 T.C. 593 (1964); Pinder v. United States, 330 F.2d 119, 124-125 (5th Cir. 1964); Concord Consumers Hous. Coop. v. Commissioner, 89 T.C. 105, 124 n.21 (1987). Petitioner consistently and repeatedly described the steps he took to deliver the photocopied returns with original signatures.

A Philadelphia Service Center stamp "IRS Received from District 052197" appears on the front page of each photocopied return with original signature for the years in issue. Petitioner contends that the stamp shows that the Baltimore District Director received the photocopied returns for the years in issue and sent them to the Philadelphia Service Center, which received the returns on May 21, 1997. Respondent offered no explanation of the stamp, and no argument to the contrary. The stamp tends to support petitioner's claim that he delivered the photocopied returns with original signatures for the years in issue to the Baltimore District Director because it apparently shows that the Philadelphia Service Center received those returns from a district office.

Arczynski, the secretary in Harrington's office who processed deliveries to Harrington on February 21, 1997, was respondent's only witness. She described routine procedures at her office but had no

knowledge of the facts of this case.

We find that petitioner hand delivered the photocopied returns with original signatures for the years in issue to someone in the building containing the District Director's offices on February 21, 1997.

3. Whether Delivery of the Returns for the Years in Issue to 31 Hopkins Plaza Constituted Filing of Those Returns

An individual taxpayer must file his or her return in the internal revenue district in which the legal residence or principal place of business of the individual is located, or at the service center serving that district, as the Secretary may by regulations designate. Sec. 6091(b)(1)(A). The applicable regulations provide:

§1.6091-2. Place for filing income tax returns.--

* * * * * * * *

(a) Individuals, estates and trusts.—(1) Except as provided in paragraph (c) of this section, income tax returns of individuals, estates, and trusts shall be filed with the district director for the internal revenue district in which is located the legal residence or principal place of business of the person required to make the return, or, if such person has no legal residence or principal place of business in any internal revenue district, with the District Director at Baltimore, Md. 21202.

* * * * * * * *

(c) Returns filed with service centers.-- Notwithstanding paragraphs (a) and (b) of this section, whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must so be filed in accordance with the instructions.

(d) Hand-carried returns.— Notwithstanding paragraphs (1) and (2) of section 6091(b) and paragraph (c) of this section--

(1) Persons other than corporations.-- Returns of persons other than corporations which are filed by hand carrying shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) as provided in paragraph (a) of this section.

Thirty-one Hopkins Plaza is a permanent post of duty for the Baltimore District Director.

To be a return for statute of limitations purposes, the document "must honestly and reasonably be intended as such" by the taxpayer. Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453, 462 (1930); Friedmann v. Commissioner, T.C. Memo. 2001-207 documents not treated as filed returns where nothing in the record shows that the taxpayer intended his delivery of documents to an agent to constitute filing of returns). A taxpayer may not, by his or her own ambiguous conduct, even if unintentional, secure the benefit of the limitations

period. See Lucas v. Pilliod Lumber Co., 281 U.S. 245, 249 (1930). Petitioner did not intend the returns that he delivered to the District Director to be his filed returns. Petitioner did not treat the photocopied returns with original signatures enclosed in the envelope that he gave to an unidentified employee at 31 Hopkins Plaza as returns he intended to file. He did not indicate that the envelope contained his tax returns, he did not request a receipt, and he did not ask that a copy of the cover letter be date-stamped, as he had done at District Counsel's offices. Petitioner's February 21, 1997, transmittal letter said he intended the original returns with original signatures, which he delivered to respondent's office of District Counsel, to be his filed returns. Thus, petitioner did not file his returns for 1987-90 or 1992-95 by hand delivering photocopies of his original returns with original signatures to 31 Hopkins Plaza on February 21, 1997. Petitioner's returns were filed on March 10, 1997, when the Baltimore Special Procedures Office of the District Director stamped them received. Thus, respondent timely issued the notice of deficiency to petitioner for tax years 1987-90 and 1992-95.[8]

B. Whether Petitioner May Carry Forward Net Operating Losses From 1981-86 to the Years in

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[8] In support of respondent's contention that the notice of deficiency was timely issued, respondent moved to reopen the record after the trial to offer into evidence (1) returns that respondent contends are petitioner's photocopied returns with original signatures for 1981-86, and (2) the envelope that respondent contends petitioner used to mail those returns to respondent's Philadelphia Service Center. In light of our conclusion that respondent timely issued the notice of deficiency, we will deny respondent's motion as moot.

Issue

1. Contentions of the Parties

Petitioner contends that his deductions for 1981-86 exceeded his income and thus generated net operating losses, and that he may carry forward those losses to the years in issue.

Respondent contends that res judicata bars petitioner from contending that his deductions exceeded his income in 1981-86 because we decided his tax liability for 1981-86 in a prior case.

Petitioner contends that res judicata does not apply because, according to petitioner, section 6214(b) and several cases he cites allow him to calculate the proper amount of tax for closed years. We agree with respondent for reasons stated next.

2. Effect of Allnutt I on Petitioner's Attempt To Litigate His Deductions for 1981-86 in This Case

Under the doctrine of res judicata, when a court of competent jurisdiction has entered a judgment on the merits of a cause of action, the parties to the suit and their privies are bound by every matter that was or could have been offered and received to sustain or defeat the claim. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Calcutt v. Commissioner, 91 T.C. 14, 21 (1988). Res judicata applies to tax cases. Commissioner v. Sunnen, supra; Calcutt v. Commissioner, supra. In Commissioner v. Sunnen, supra at 598, the Supreme Court said:

> Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or nonliability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. * * *

Res judicata applies to all matters which were or might have been offered in the prior case. Nevada v. United States, 463 U.S. 110, 129-130 (1983); Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Commissioner v. Sunnen, supra at 597. Issues which affect the computation of tax liability that were or could have been litigated in a prior case are part of the cause of action which are barred if res judicata applies. Boyd v. Commissioner, 101 T.C. 365, 371 (1993); Trost v. Commissioner, 95 T.C. 560, 566 (1990).

Three requirements must be satisfied for res judicata to preclude relitigation of a taxpayer's tax liability. Two of these requirements are that: (1) The parties in the second case must be the same as or in privity with the parties in the first case, and (2) the first case must have resulted in a final judgment on the merits by a court of competent jurisdiction. Commissioner v. Sunnen, supra; see Nevada v. United States, supra; Federated Dept. Stores, Inc. v. Moitie, supra. The first requirement is met here because the parties are identical in both cases. The second requirement is met because Allnutt I resulted

in a final judgment on the merits.[9] This is so because a decision based on a party's failure to state a claim on which relief may be granted is a decision on the merits with full res judicata effect. State Farm Mut. Auto. Ins. Co. v. Dyer, 19 F.3d 514, 518 n.8 (10th Cir. 1994); Winslow v. Walters, 815 F.2d 1114, 1116 (7th Cir. 1987).

The third requirement is that the cause of action, i.e., the tax liability, in the second case must be the same as in the prior case. Petitioner contends that the third requirement is not met because net operating loss carryforwards at issue in the instant case were not at issue in Allnutt I. Petitioner's argument is an attempt to sidestep well-settled principles of res judicata. To prevail on a net operating loss carryforward claim, petitioner must show that (1) he had a loss in a prior year; i.e., that his deductions, losses, or credits exceeded his taxable income in a prior year; and (2) the prior year's loss may be applied against income in a later year. Sec. 172. Obviously, the second of these points was not decided in Allnutt I. However, the first point was decided: we decided that he had taxable income in the 1981-86 years. Thus, he did not have losses in those years. That decision is now final. Res judicata bars petitioner from relitigating that issue here. We conclude that the third requirement is met, and that petitioner is barred by res judicata from arguing that he has losses in 1981-86 which he can carry forward to the years in issue.

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[9] Petitioner does not dispute that the first and second requirements are met. Petitioner is attempting in substance to reopen closed years.

3. Section 6214(b)

Petitioner contends that section 6214(b)[10] permits him to deduct net operating losses for 1981-86 in this case because it requires us to consider facts from other years to correctly redetermine a deficiency. We disagree.

Section 6214(b) provides that we shall consider facts from other years as may be necessary to redetermine correctly deficiencies in the years before us. However, petitioner's 1980-86 tax years were at issue in Allnutt I, and res judicata bars reconsideration of issues that could have been litigated in that case. Thus, we reject petitioner's contention that section 6214(b) overrides res judicata.

4. Barenholtz v. United States, Springfield St. Ry. Co. v. United States, Robarts v. Commissioner, Hamilton Indus., Inc. v. Commissioner, and Budd Co. v. Commissioner

Petitioner contends that, on the basis of the holdings in Barenholtz v. United States, 784 F.2d

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[10] Sec. 6214(b) provides:

SEC. 6214(b). Jurisdiction Over Other Years and Quarters.--The Tax Court in redetermining a deficiency of income tax for any taxable year or of gift tax for any calendar year or calendar quarter shall consider such facts with relation to the taxes for other years or calendar quarters as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other year or calendar quarter has been overpaid or underpaid.

375, 380-381 (Fed. Cir. 1986); Springfield St. Ry. Co. v. United States, 160 Ct. Cl. 111, 312 F.2d 754, 757-759 (1963); Robarts v. Commissioner, 103 T.C. 72 (1994), affd. without published opinion 56 F.3d 1390 (11th Cir. 1995); Hamilton Indus., Inc. v. Commissioner, 97 T.C. 120, 127-128 (1991); and Budd Co. v. Commissioner, 33 T.C. 813 (1960), he is not precluded by res judicata from disputing whether he may deduct net operating losses from 1981-86 in the years in issue because those cases allowed consideration of facts from closed tax years. We disagree. The courts in those cases allowed the parties to consider facts from years closed by the statute of limitations in calculating tax liabilities for the years before the court. However, those cases do not control here because they did not involve years that were litigated and barred by res judicata.

5. Conclusion

We conclude that res judicata bars petitioner from disputing the amounts of his deductions for 1981-86. Thus, petitioner may not deduct net operating losses carried forward from 1981-86 to the years in issue.

C. Whether To Grant Petitioner's Motion To Dismiss and Impose Sanctions

After trial and briefing, petitioner moved to dismiss this case and to impose sanctions on respondent under Rule 104(c). Petitioner contends that he sought discovery of Forms 895, Notice of Statute Expiration, for tax years 1987-98 and that respondent failed to give him those forms until

December 28, 2001. Petitioner contends that the Forms 895 "indisputably prove" that he filed his returns in February 1997. Petitioner contends that we should have a hearing if we deem it necessary. A hearing is not necessary.

Petitioner points out that the Forms 895 include an entry which states: "Statute Date: 022000". Petitioner contends (and respondent does not deny) that respondent uses the Forms 895 to track the date that the period of limitations expires, that "statute date" refers to the statute of limitations, and that "022000" means February 20, 2000. Petitioner points out that he signed and dated his returns on February 20, 1997, 3 years before February 20, 2000. Thus, petitioner contends that the Forms 895 establish that he filed the returns for the years in issue on February 21, 1997. We disagree. A Form 895 does not establish when a taxpayer's returns were filed; filing of a return is established by facts showing proper delivery or mailing of a return with the intent to file it as a return. See sec. 6091(b)(1)(A); Lucas v. Pilliod Lumber Co., 281 U.S. at 249; Florsheim Bros. Drygoods Co. v. United States, 280 U.S. at 462; sec. 1.6091-2(d)(1), Income Tax Regs.

Petitioner filed a motion asking that we dismiss this case and impose sanctions on respondent under Rule 104(c). Petitioner contends that respondent withheld the Forms 895 in bad faith and points out that we have considerable discretion to impose sanctions, citing Fox v. Commissioner, 718 F.2d 251 (7th Cir. 1983).

Respondent contends that the Forms 895 were provided to petitioner several months before trial. As the moving party, petitioner bears the burden of proof under the normal evidentiary rule imposing proof obligations on the moving party. United States v. Rexach, 482 F.2d 10, 16 (1st Cir. 1973); see Pietanza v. Commissioner, 92 T.C. 729, 736 (1989), affd. without published opinion 935 F.2d 1282 (3d Cir. 1991); S. Cal. Loan Association v. Commissioner, 4 B.T.A. 223 (1926). Petitioner has not met the burden of proving that respondent withheld the Forms 895 or that respondent violated any order.[11] We will deny petitioner's motion to dismiss his case and to seek sanctions under Rule 104(c).

Accordingly, An appropriate order will be issued.

[11] Petitioner relies on United States v. OMNI Intl. Corp., 634 F. Supp. 1414 (D. Md. 1986), and other cases involving prosecutorial misconduct. That reliance is misplaced because those cases involved sanctions for prosecutorial conduct in criminal prosecutions.

FILED: July 1, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1477
(00-6133)

FRED W. ALLNUTT, SR.,
Petitioner - Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent - Appellee.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Duncan, Senior Judge Hamilton and District Judge Osteen.

For the Court
/s/ Patricia S. Connor
Clerk